U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 28 September 2004

CASE NO.: 2004-LHC-00624

OWCP NO.: 02-132142

In the Matter of

DEBORAH D'HULST
Claimant

v.

ARMY & AIR FORCE EXCHANGE SERVICE
Employer/Self-Insured

Appearances:

Janmarie Toker, Esquire (McTeague, Higbee,
Case, Cohen, Whitney & Toker), Topsham,
Maine, for the Claimant

Matthew R. Lavery, Associate General Counsel
(Army & Air Force Exchange Service, Litigation Division),
Dallas, Texas, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim for worker's compensation benefits filed by Deborah D'Hulst (the "Claimant") against the Army & Air Force Exchange Service ("AAFES") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA") as extended by the Non-appropriated Fund Instrumentalities Act, 5 U.S.C. § 8171-8173 (the "NFIA"). The claim was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in Portland, Maine on April 6, 2004, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer. Testimony at the hearing was elicited from the Claimant, two vocational experts and a claims adjuster employed by AAFES. The parties offered stipulations which were admitted as Joint Exhibit ("JX"), and documentary evidence was admitted at the hearing without objection as Claimant's Exhibits ("CX") 1-25 and Employer Exhibits ("EX") 1-20. Hearing Transcript ("TR") 10-14. At the close of the hearing, the record was held open at the Claimant's unopposed request for a period of 30 days to allow her to offer recent medical records from G.T. Caldwell, M.D. TR 14, 223-224. The parties also requested an opportunity to file written closing argument. TR 223-224.

By letter from her attorney dated April 21, 2004, the Claimant offered medical records from Dr. Caldwell dated April 2, 2004. AAFES did not object, and these records have been admitted as CX 26. Additionally, on April 22, 2004, the Claimant offered what was described as an "updated report" dated April 14, 2004 from her vocational consultant. By letter dated April 30, 2004, AAFES objected and moved to exclude this evidence, asserting that no provision was made at the hearing for admission of post-hearing evidence other than medical records from Dr. Caldwell. The Claimant did not respond to AAFES' motion which was granted by order issued on May 20, 2004. The order also closed the record and set June 15, 2004 as the deadline for submission of post-hearing briefs.

By letter dated May 18, 2004, the Claimant offered a report from Dr. Caldwell dated April 20, 2004. AAFES objected and moved to exclude this report on the ground that it was submitted outside of post-hearing time frame established at the hearing. For the reasons discussed below, AAFES's objection is overruled, and Dr. Caldwell's April 20, 2004 report has been admitted as CX 27. Further, I have reconsidered my order excluding the post-hearing reports from the Claimant's vocational consultant, and these records have been admitted for limited purposes described below. AAFES' unopposed request for an extension of the briefing schedule to June 30, 2004 was granted, and post-hearing briefs were timely received from both parties. The record is now closed.

Upon review of the evidence of record and the parties' arguments, I conclude that the Claimant has established entitlement to periods of temporary total and temporary partial disability compensation beyond the amounts voluntarily paid by AAFES, interest on unpaid compensation and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Evidentiary Issues

As outlined above, the Claimant has moved to admit a report from Dr. G.T. Caldwell dated April 20, 2004, and AAFES objects that the report from Dr. Caldwell should be excluded on the ground that it was not submitted within the post-hearing time frame established at the close of the hearing. The Claimant also moved in her post-hearing brief for reconsideration of the May 20, 2004 order which excluded the April 14, 2004 updated report from her vocational

consultant, and she has now offered as CX 28 additional records that her attorney received from the vocational consultant in late June.

With regard to the report from Dr. Caldwell, it is noted that AAFES did not oppose the Claimant's request for post-hearing leave to offer additional medical reports from Dr. Caldwell and that it has not claimed that it would be prejudiced in any way by admission of the doctor's April 20, 2004 report. Moreover, AAFES itself was granted an extension of the filing deadline for closing argument which was not filed until several weeks after AAFES had been served with Dr. Caldwell's April 20, 2004 report. Under these circumstances, the Claimant's late submission of this evidence has been treated as a motion to extend the post-hearing deadline for offering additional medical records which is hereby granted, and Dr. Caldwell's April 20, 2004 report has been admitted as CX 27.

I have also reconsidered the May 20, 2004 which excluded the April 14, 2004 report from the Claimant's vocational consultant. As the Claimant points out in her brief the vocational consultant, Nancy Bogg, M.Ed., was appointed by the OWCP to develop a vocational rehabilitation plan. Ms. Bogg testified at the hearing regarding the services she had provided and indicated that she intended to recommend certain adjustments or a "status change" to the Claimant's vocational rehabilitation plan. The post-hearing reports offered by the Claimant reflect that Ms. Boggs made the recommendation described in her testimony and that the OWCP has approved the revised plan, the details of which are described below. Under these circumstances, I agree with the Claimant that it is appropriate to have the most recent vocational rehabilitation evidence included in the record, and I have admitted the post-hearing reports from Ms. Bogg as CX 17A and CX 28 for the purpose of establishing the current status of the Claimant's OWCP-approved vocational rehabilitation plan.[1]

III. Findings of Fact and Conclusions of Law

A. Stipulations and Issues Presented

At the hearing, the parties offered the following stipulations which I hereby adopt as findings:

(1) The LHWCA applies to this claim;

(2) The injury occurred on September 1, 2002;

(3) The injury occurred at the AAFES Burger King office, Heidelberg Exchange, Germany;

(4) The injury arose out of and in the course of the Claimant's employment with AAFES;

[1] The April 14, 2004 report from Ms. Bogg has been admitted as CX 17A, and the additional records from Ms. Bogg that were submitted with the Claimant's post-hearing brief have been admitted as CX 28.

(5) There was an Employer/Employee relationship at the time of injury;

(6) AAFES was timely notified of the injury;

(7) The claim for benefits was timely filed;

(8) The Notice of Controversion was timely filed;

(9) An Informal Conference was conducted on November 6, 2003;

(10) The Claimant's average weekly wage at time of injury was $488.76;

(11) Compensation has been paid as follows:

a. Temporary Total Disability week from 9/9/02 to 9/15/02 at $325.84 per week, totaling $325.84;
b. Temporary Total Disability from 9/30/02 to 10/14/02 at $325.84 per week, totaling $698.23;
c. Temporary Total Disability from 10/16/02 to 8/15/03 at $325.84 per week, totaling $14,150.77;
d. Temporary Partial Disability from 8/16/03 to 2/27/04 at $126.68 per week, totaling $3,547.00;
e. Temporary Partial Disability from 02/28/04 and continuing at $55.92 per week; and

(12) Medical benefits have been paid in the total amount of $3,745.06.

(13) The extent of Claimant's disability is in dispute;

(14) AAFES alleges the Claimant reached maximum medical improvement on November 10, 2003;

(15) The Claimant did not return to her usual job as a regular full-time Assistant Food Manager (BK); and

(16) The Claimant has not engaged in any alternative employment since the date of injury.

JX 1. The parties have also agreed that the unresolved issues to be adjudicated are (1) the extent of disability; (2) employability; (3) whether the Claimant was enrolled in a DOL-sponsored educational program at the time of trial; (4) whether Claimant needs a DOL-sponsored educational program to increase her wage earning capacity; and (5) whether Claimant should work part-time if she is accepted into a DOL sponsored educational program; whether the Claimant is entitled to an award of attorney fees and expenses. *Id.*

B. Background

The Claimant is a 41 year old native of Maine who graduated from high school in 1981 with a concentration in business and accounting. TR 19, 47-48; EX 1. After high school, she took additional business courses for eight months at a local college, and she successfully completed a one-year correspondence course in accounting for which she received a bookkeeping certificate. TR 48; EX 1. In 1999, while in the process of divorcing her first husband and the father of her two children, she moved to Germany in order to marry member of the Belgian armed forces who was stationed in Germany. TR 19-20, 46.[2] She obtained employment with AAFES and quickly advanced to the position of assistant manager in a Burger King restaurant operated by AAFES on a U.S. military base in Heidelberg. TR 21-22; CX 10. On September 1, 2002, she was injured when she fell at work and landed on her buttocks, resulting in low back and hip pain. TR 22-23; CX 24; EX 7.[3] She sought medical treatment for this injury and briefly returned to work on restrictions to light duty and a part-time, four hour per day schedule. TR 26. After a few weeks on part-time light duty, the Claimant was notified by AAFES on November 1, 2002 that her medical restrictions could no longer be accommodated, and she went out of work. TR 27-28; CX 11. The parties have stipulated that AAFES then voluntarily commenced temporary total disability compensation payments. She subsequently encountered marital problems, voluntarily resigned from her position with AAFES on January 2, 2003, and left Germany on January 13, 2003 to return to her family home in Norridgewock, Maine. TR 28, 53-54; EX 5. The Claimant testified that in addition to the problems in her new marital relationship, other considerations that played a role in her decision to return to Maine included a desire to move in with her daughter who was in high school and to be closer to her parents who were in poor health as well as her belief that she could not obtain proper medical care for her condition in Germany. TR 54. The Claimant has not returned to any gainful employment since the September 1, 2002 but has participated in vocational rehabilitation services through the OWCP. She seeks an award of continuing temporary total disability which AAFES opposes on the ground that it has established the availability of suitable alternative employment.

C. Medical Treatment and Opinions on Work Capacity

Upon her return to Maine, the Claimant received treatment from Joseph J. Caldwell, M.D. whose initial diagnosis was bilateral sacroilitis and bilateral sciatica. CX 21 at 110. When he first saw the Claimant in January 2003, Dr. J. Caldwell stated that she did not have any work capacity. *Id.* at 109.[4] Dr. J. Caldwell prescribed medication and referred the Claimant to a physiatrist, Jonathan Herland, M.D. *Id*. at 109, 112-113. The Claimant testified that she tried

[2] The Claimant testified that her divorce from her first husband became final in February 2000. TR 47.

[3] It is noted that the medical records indicate that the Claimant had a prior episode of low back pain in 1998 and that a CT scan in March 1998 showed bulging at the L4-5 disc space. EX 11 at 7.

[4] Dr. Joseph Caldwell is referred to herein as Dr. J. Caldwell to avoid confusion with Dr. G.T. Caldwell who later saw the Claimant on referral from her attorney.

the prescribed medications for a few weeks but found that they did not help, and she had not taken any medication for over a year at the time of the hearing. TR 55-56.

Dr. Herland saw the Claimant in May 2003 and recommended fluoroscopy-guided injections into her lower back which the Claimant declined. CX 23. According to Dr. J. Caldwell's office notes, the Claimant decided not to accept Dr. Herland's recommendation for injection treatment because her mother had undergone similar treatment for a bad back without positive results and because she was unwilling to "waste time" having injections and waiting for six weeks to see if they helped. CX 21 at 117.

Dr. J. Caldwell also recommended water-based or pool physical therapy and work hardening. *Id.* at 118-120. The Claimant had previously indicated to a physician assistant in Dr. J. Caldwell's office that she had already tried physical therapy and other "conservative remedies" which had not helped, and it is undisputed that the Claimant never obtained any physical therapy although it was authorized by AAFES. *Id.* at 117. She was last seen in Dr. J. Caldwell's office on September 3, 2003. *Id.* at 121.

The Claimant testified that she stopped treatment with Dr. J. Caldwell and was unable to follow his recommendation for pool therapy and work hardening because she had "car problems." TR 30, 59-60. She also stated that Dr. J. Caldwell moved, and she was unable to find his new office. TR 60-61. However, the record suggests that the Claimant stopped seeing Dr. J. Caldwell because of differences of opinion regarding appropriate treatment and her ability to return to work. In this regard, Dr. J. Caldwell's office wrote to Ms. Bogg, the OWCP-appointed vocational consultant, on November 3, 2003, stating that the Claimant had not followed Dr. J. Caldwell's recommendations, that she was unwilling to return for follow-up, and that Dr. J. Caldwell was therefore unwilling to do any type of evaluation or comment on her work capacity. EX 12 at 21. Moreover, the record shows that Dr. J. Caldwell's physician assistant approved of several positions identified in an August 15, 2003 labor market survey conducted for AAFES. EX 9 at 19-24.

During the time that the Claimant was being treated by Dr. J. Caldwell, she was examined at AAFES' request on March 24, 2003 by Philip R. Kimball, M.D., a board-certified orthopedic surgeon. EX 11. Dr. Kimball diagnoses were (1) chronic low back pain with right leg pain, (2) status post contusion of the lower back on September 1, 2002, (3) pre-existing degenerative disc disease at L4-5, and (4) obesity. *Id.* at 8.[5] He also stated that he disagreed with Dr. J. Caldwell's diagnosis of bilateral sacroilitis and sciatica, noting that she had no left leg pain, and he described the September 1, 2002 workplace injury as "a contusion of the lower back, superimposed at this time on a deconditioned individual with L4-5 degenerative disc disease." *Id.* He further stated that he felt that the Claimant had a sedentary and probably light duty work capacity, and he recommended conditioning, weight loss and pain management treatment with Dr. Herland. *Id.* at 8-9, 11-12.

[5] Dr. Kimball's physical examination showed the Claimant to weigh 232 pounds at 63 inches, a condition he described as "quite obese." EX 11 at 7.

Dr. Kimball saw the Claimant for a follow-up examination on November 10, 2003, at which time he described her condition as "stable." EX 11 at 16. He further stated,

> She has had no treatment for almost nine to ten months, except for rest at home and the lack of employment. It is difficult to tell what her current condition is, in that on physical examination she demonstrates no positive findings, except an unwillingness to laterally bend completely. Her complaints are nearly the same as shortly after her fall 14 months ago, and although subjectively she complains, I do not see objective findings to document a persisting problem.

Id. He described the Claimant's failure to follow Dr. J. Caldwell's recommendations for medication, physical therapy and treatment with Dr. Herland as "vexing", and he assumed from the Claimant's failure to heed medical advice that "she probably is feeling quite well, which would correlate with her physical examination." *Id.* at 1. He also stated that the Claimant could return to her Burger King job with restrictions based on her degenerative lumbar disc condition of no repetitive forward bending and no lifting more than 40-45 pounds. *Id.*

In addition to Drs. Kimball, Herland and J. Caldwell, the Claimant was examined in February 2004 on referral from her attorney by G.T. Caldwell, M.D., a board-certified specialist in rehabilitation medicine. CX 20. In his February 3, 2004 report, Dr. G.T. stated that he believed that the Claimant had suffered a disc injury, causing inflammation of the nerve root at L4-5, as a result of the September 1, 2002 fall at work which occurred with a background of pre-existing disc abnormalities. *Id.* at 107. Regarding the Claimant's work capacity, he stated,

> I believe it is medically appropriate for her to find work other than the type of work she was doing at Burger King. I do not think she can tolerate heavy work or repetitive work that involves twisting, bending, or standing for long periods of time. At the present time, I believe that she has a capacity to work only four hours per day at a sedentary to light duty capacity – this means no lifting more than ten pounds and that would apply to pushing, pulling and carrying as well. She would not be able to tolerate bending or awkward position. She needs the flexibility so that she can sit, stand and move around according to her symptoms, approximately 15-20 minutes.

Id. at 107-108. Dr. G.T. Caldwell also stated that he did not believe that the Claimant had reached maximum medical improvement, suggesting that she could improve her level of functioning with a regular exercise program including pool therapy, and he agreed with the recommendations of Drs. J. Caldwell and Kimball that the injection treatments proposed by Dr. Herland would be beneficial, both therapeutically and diagnostically. *Id.* at 108. The post-hearing records from Dr. Caldwell indicate that he took over the Claimant's medical care and administered a L4-5 lumbar transforaminal epidural injection on April 2, 2004. CX 26. When Dr. G.T. Caldwell saw the Claimant for a follow-up appointment on April 27, 2004, she reported no relief from the injections. CX 27 at 1. Dr. Caldwell stated that there was not a lot more in the way treatment that he could offer. And he suggested that the Claimant enroll in a lumbar stabilization or

rehabilitation program which, he said, have proven effective in reducing similar patients' pain while improving their level of functioning. *Id.*

Following Dr. G.T. Caldwell's first examination, AAFES had the Claimant undergo a functional capacity evaluation at Maine Physical Therapy in Waterville, Maine. EX 20. Based on the test results, the evaluator reported that the Claimant's current abilities did not meet the requirements of the assistant manager's position in a Burger King restaurant and that the Claimant had a work capacity for sedentary work with restrictions that would allow her to sit or stand at will with limited walking, bending and twisting. *Id.* at 1, 7. In addition, the evaluator reported that the Claimant was not ready at that time to return to work for eight hours per day even at the sedentary level and that she "may need to gradually build to 8 hr day based on findings as well as length of time out of work." *Id.* at 7. Finally, the evaluator reported that the Claimant passed all tests for validity and reliability of the evaluation. *Id.* at 5.

Dr. Kimball testified at a deposition that the Claimant's CT scan and MRI showed disc bulging at L4-5 but no herniation, and he said that these findings do not indicate the presence of pathology. EX 19 at 10-12. He said that he interpreted the Claimant's September 1, 2002 injury as a contusion to her back and buttocks when she hit the floor. *Id.* at 12. He stated that the Claimant had no signs of nerve root irritation or damage when he examined her but said that he thought Dr. Herland would be able to help establish a diagnosis and possibly help the Claimant's subjective complaints of pain that were not supported by the objective findings. *Id.* at 13-14. Dr. Kimball testified that he had a hard time figuring out what is wrong with the Claimant from his physical examination. *Id.* at 14. He stated that when he reexamined the Claimant in November 2003, she continued to complain of pain and said that her right leg would collapse on occasion with sharp pain, but he saw nothing in the MRI that would cause her leg to collapse. *Id.* at 16-18. He also noted that the Claimant raised a new complaint during his second examination of a bilateral wrist pain when typing on a computer which he found difficult to connect to her fall 18 months earlier. *Id.* at 19. Dr. Kimball testified that the Claimant had not developed anything in the time between his two examinations that would indicate that she had a nerve root problem or any new condition, and he felt that she had reached maximum medical improvement by the date of his second examination because she hadn't had any additional treatment. *Id.* at 21-23. He further stated that he didn't think that the Claimant's degenerative disc disease or bulging disc was caused by the accident at work and that the contusion injury that she did sustain at work should have resolved by the time of his deposition. *Id.* at 25-26. Dr. Kimball said that restrictions of no repetitive forwarding bending and lifting limited to 40 pounds were reasonable in light of the Claimant's degenerative disc disease, but he said that the Claimant could work eight hours per day and stand, walk, sit and drive her vehicle without restrictions. *Id.* at 26-27.

Dr. Kimball was questioned about the Claimant's activities as depicted in a surveillance video which is in evidence as EX-18. He observed that the video demonstrated the Claimant's ability to climb stairs without assistance, walk in a somewhat accelerated manner and bend forward, although he noted that the film shows

one occasion when she walked with a limp and resorted to holding a handrail while climbing a set of stairs. EX 19 at 28-29. In sum, he said that he was not surprised by the Claimant's activities on the surveillance video because he had not found any severely limiting conditions in his examinations. *Id.* at 31-32.

Dr. Kimball also addressed Dr. G.T. Caldwell's report and noted that there were significant differences between his physical findings and those reported by Dr. Caldwell. *Id.* at 33-34. He concluded that the only explanation for the different findings would be that the Claimant was either having very good days on the two occasions when he examined her or a very bad day when she was seen by Dr. Caldwell. *Id.* at 35. Regarding the Claimant's limitations, Dr. Kimball testified that he did not think that she would need to lie down after an hour or two of moderate to light activity or lie down during an eight-hour workday, but he did say that he thought it might be a good idea for the Claimant to work less than eight hours per day at first so that she could work herself up to full-time status, and that it would be helpful for her to be able to sit and take breaks if needed. *Id.* On the other hand, he said that he might have recommended more severe work restrictions, including a limit to working four hours per day, had the Claimant's presentation during his examinations been the same as seen by Dr. G.T. Caldwell, but he added that his opinion on the Claimant's work capacities had not changed given his findings in two physical examinations. *Id.* at 37-38. He also testified that although he believed that epidural cortisone injections might have been a good idea shortly after the Claimant's September 1, 2002 injury, he did not think that the injections proposed by Dr. G.T. Caldwell in 2004 would be of any significant benefit due to the passage of time since the injury. *Id.* at 53-56.

Finally, Dr. Kimball reviewed the jobs listed in the labor market surveys introduced by AAFES and testified that he felt that all of the jobs were appropriate for the Claimant to try. *Id.* at 39-43. He cautioned that any job the Claimant attempted should be considered to be on a trial basis until one could see how she responded. *Id.* at 39. However, it remained his opinion that the Claimant could return to sedentary work with a 40 pound lifting restriction four eight hours per day on a continuous basis. *Id.* at 45.

D. Nature and Extent of the Claimant's Disability

The primary issue in this case concerns the extent of any disability suffered by the Claimant subsequent to August 16, 2003 when AAFES reduced her compensation to temporary partial disability payments based on its position that there is suitable alternative employment that she could perform. The LHWCA defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). The statutory definition thus encompasses a recognition of both the economic and medical effects of an injury. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 777 (1st Cir.1979) (*Air America*). Disability under the Act involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991).

1. Nature of the Claimant's Disability – Temporary or Permanent?

To be considered permanent, a disability need not be eternal or everlasting; it is sufficient that the condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Air America* at 781, citing *Watson v. Gulf Stevedoring Corp*., 400 F.2d 649, 654 (5th Cir. 1968). *See also Stevens v. Lockheed Shipbuilding Co*., 22 BRBS 155, 157 (1989). The traditional measure for determining whether a disability is temporary or permanent is whether the medical evidence establishes that the injured worker has reached maximum medical improvement. *Seidel v. General Dynamics Corp*., 22 BRBS 403, 407 (1989). Dr. Kimball testified that it is his opinion that the Claimant had reached a point of maximum medical improvement when he saw her for a second time in November 2003 because she had not received any recent treatment. However, Dr. Kimball and Dr. G.T. Caldwell have both indicated that the Claimant's level of functioning could be improved by a course of physical rehabilitation which the Claimant had not undertaken by the time of the hearing. Under these circumstances, I find that the Claimant has not reached a point of maximum medical improvement and that her disability has not continued for a lengthy period of time. Accordingly, I find that any disability is temporary in nature.

2. Extent of Disability – Total or Partial?

A three-part test has been established to determine whether a claimant qualifies for a total disability award: first, the Claimant must make a *prima facie* case of total disability by showing she cannot perform her former job because of job-related injury; second, if the Claimant makes this showing, the burden shifts to AAFES to establish that suitable alternative employment is readily available in the Claimant's community for individuals with the same age, experience, and education as the Claimant; and third, the Claimant can rebut the showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*).

The Claimant's usual employment is the job that she was performing at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982). There is some conflict in the evidence on the question of whether the Claimant could go back to work as an assistant manager for AAFES in the Burger King restaurant. Although the Claimant's uncontradicted testimony establishes that AAFES was unable to accommodate her medical restrictions following the September 1, 2002 injury, and although AAFES has made no contention in this proceeding that the Claimant is able to return to her usual employment, Dr. Kimball saw no reason why the Claimant could not return to her job as a Burger King assistant manager as long as she followed restrictions of not lifting more than 40 pounds and not repetitively bending and twisting. On the other hand, Dr. G.T. Caldwell, whose opinion is supported by the valid and reliable functional capacity assessment obtained by AAFES, concluded that the Claimant could not return to her former job. Since it is unclear from the record whether Dr. Kimball was aware of and considered the exertional requirements of the Burger King Assistant Manager position which were specifically addressed in the functional capacity assessment, and given Dr. G.T. Caldwell's specialty in rehabilitation medicine, I find that a preponderance of the evidence establishes that the Claimant unable to return to her usual employment as a Burger King assistant manager.

Since the Claimant has established that she is unable to return to her usual employment, the burden shifts to AAFES to establish the existence of suitable alternative employment. AAFES can meet this burden only by proving that "there exists a reasonable likelihood, given the claimant's age, education, and background, that [s]he would be hired if [s]he diligently sought the job." *Legrow* at 434, quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043 (5th Cir.1981) (*Turner*). AAFES has introduced two labor market surveys and testimony from Gerald K. Wells, Ph.D., a distinguished expert and published author in the field of vocational rehabilitation. Dr. Wells testified at the hearing that he was asked to conduct a labor market survey using the restrictions that Dr. Kimball had assigned. TR 148. He also met with the Claimant and concluded, on the basis of his analysis of her transferable skills, that the Claimant possessed skills (namely, specific course work following high school in general business and accounting, vocational training in bookkeeping and other specific office practices such as filing, typing, handling correspondence and phone communication, and management and supervision of workers) that would readily transfer to a wide variety of occupations and provide her with an advantage in the workplace. TR 149, 152.

In his first labor market survey which is dated August 15, 2003 (EX 9 at 1-10), Dr. Wells identified seven entry-level jobs, six in Skowhegan and Waterville and one in Augusta, in the light to sedentary range which he felt were suitable for the Claimant after his office discussed the specific job requirements with the prospective employers. TR 154-155. He testified that Dr. Kimball and Dr. J. Caldwell's physician assistant approved at least six of the jobs in the labor market survey. TR 156-157. He further testified that his office contacted all the employers in the first labor market survey 30 days after the survey was completed, and none of the employers had any record of an application for employment from the Claimant or any recollection of any contact with the Claimant. TR 158.

Dr. Wells testified that he conducted a second labor market survey (EX 9 at 25-19) on February 24, 2004 after he had been asked to find full-time and part-time jobs. TR 159. He said that he found five additional full-time jobs and three part-time jobs as an "inbound" telemarketer, bank teller and medical secretary/receptionist, all of which were compatible with the sedentary restrictions outlined in Dr. G.T. Caldwell's recommendations. TR 159-160. He said that the telemarketing and bank teller jobs would be up to 30 hours per week. TR 170-171. Dr. Wells testified that he discussed the Claimant's restrictions with the part-time employers, and they all thought that the Claimant could perform the jobs within those restrictions. TR 161, 176. He also said that all of the part-time employers were contacted after the second survey was completed, and only the bank reported receiving any inquiry from the Claimant. TR 169.

Lastly, Dr. Wells testified that the Claimant already has many of the skills necessary to find a job and that the jobs he identified are of the same type that the Claimant will be able to find after completing the vocational rehabilitation program. TR 173. He expressed concern that even after going to school for two years, the Claimant's salary level would still not be as high as what she was making as a Burger King assistant manager at the time of her injury. TR 173.

In determining whether AAFES has met its burden of establishing the existence of suitable alternative employment, I credit, for the reasons previously outlined, the medical

opinion of Dr. G.T. Caldwell and the functional capacity assessment over the contrary opinions from Drs. Kimball and J. Caldwell regarding the Claimant's functional capacities, and I find that the Claimant has a present work capacity for part-time sedentary work with the restrictions identified by Dr. G.T. Caldwell. Therefore, I conclude that the August 15, 2003 labor market survey is inadequate to establish the existence of suitable alternative employment because it only contains full-time jobs. Moreover, there is no evidence that any of the jobs in the first survey are compatible with the restrictions identified by Dr. G.T. Caldwell and the functional capacity evaluation. However, I further find that the February 24, 2004 survey, in which Dr. Wells identified three part-time jobs that are all compatible with the restrictions outlined by Dr. G.T. Caldwell, does meet AAFES' suitable alternative employment burden in light of Dr. Wells' testimony that he specifically contacted the part-time employers to discuss the Claimant's restrictions and was told that the employers all thought that the Claimant could perform the jobs with her restrictions. That is, I find that this vocational evidence satisfies *Legrow's* requirement of a showing that there is a reasonable likelihood, given the Claimant's age, education, and background, that she would be hired if she diligently sought the jobs.

The showing of suitable alternative employment by the second labor market survey may not be applied retroactively in the absence of substantial evidence that the suitable jobs existed at an earlier date. *See Palombo v. Director, OWCP*, 937 F.2d 70, 77 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312-313 (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 1258-60 (9th Cir. 1990). There is no evidence in this record that the three part-time, sedentary jobs identified by Dr. Wells in the February 24, 2004 labor market survey were in existence before he contacted the prospective employers and ascertained that they could accommodate the Claimant's restrictions. Consequently, I find that the Claimant's total disability compensation payments should have continued at least until February 24, 2004 when AAFES established the existence of suitable alternative employment. Whether the Claimant is entitled to continuing total disability compensation after that date depends, as discussed above, on whether she has shown a diligent, but unsuccessful, attempt to find work "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Turner* at 1043.

The Claimant does not contend that she has diligently attempted to secure alternative employment, but she nonetheless asserts that she has established entitlement to total disability compensation because she is participating in a vocational rehabilitation plan approved by the OWCP. Claimant's Brief at 6-8.[6] In this regard, it is by now well-settled that a claimant may be entitled to receive total disability compensation despite an employer's showing of suitable alternate employment, if she establishes that the suitable jobs are not reasonably available due to her participation in a DOL-approved rehabilitation program. *See Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 315 F.3d 286, 295-296 (4th Cir. 2002) (*Newport News*); *Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994); *Castro v. General*

[6] Although the Claimant testified at the hearing that she could probably work a part-time job up to 30 hours per week, she admitted that the only part-time job that she had applied for in the second labor market survey was at the Skowhegan Savings Bank. TR 67. In my view, filing a single application falls well short of demonstrating due diligence. *See Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 236 n.7 (1985).

Constr. Co., 37 BRBS 65, 67 (2003) (*Castro*). Nevertheless, AAFES argues that the Claimant cannot avoid the compensation consequences of its successful showing of suitable alternative employment by seeking vocational rehabilitation because the retraining plan is an artifice created by her attorney that will not increase her current wage-earning capacity.

Regarding the Claimant's vocational rehabilitation, the record shows that Ms. Bogg, a certified rehabilitation counselor who is authorized by the OWCP to provide vocational rehabilitation services to injured workers, was assigned by the OWCP to begin working with the Claimant in November 2003. CX 17 at 81. Ms. Boggs testified that after an initial meeting with the Claimant in her attorney's office, she determined that the Claimant was not ready to pursue job placement and should begin pre-vocational training in preparation for entry into a full-time vocational rehabilitation program. TR 93, 105-106. Based on this assessment, Ms. Bogg recommended and obtained OWCP approval for remedial adult education courses in algebra and basic writing in order to prepare the Claimant for additional courses that would lead to a rehabilitation program designed to train her for office work. TR 94, 122-123. This initial pre-vocational training was scheduled to run from January 12, 2004 until July 16, 2004. CX 17 at 80. Ms. Bogg testified that as of the time of the hearing, the Claimant was not participating in a full-time educational program and that full-time training would not begin until the fall of 2004 after the Claimant received her grades from the remedial courses. TR 135-136. Ms. Bogg stated that the Claimant should be finished with her the full-time program by May 2006, at which point she expected that the Claimant would have a wage-earning capacity in the range of $10.00 to $12.00 per hour. TR 138. Ms. Bogg also stated that she had not made any recommendation to the OWCP regarding the Claimant seeking part-time work while taking the remedial courses. TR 125. She said she had worked a little with the Claimant on finding a part-time job but that her responsibility at the time of the hearing, according to the Department of Labor, was limited to addressing the Claimant's training needs. TR 134. The record shows that the two remedial courses met two nights per week. CX 17 at 83. The Claimant admitted at the hearing that she could work up to 30 hours per week while taking these classes. TR 67.

Subsequent to the hearing, Ms. Bogg submitted a recommendation to the OWCP that the Claimant's status be changed to a two-year A.S. degree program as an administrative assistant at the Kennebec Valley Community College in Fairfield, Maine. CX 28 at 4. This program would begin in September 2004 and conclude in June 2006. *Id.* at 6. In support of the requested status change, Ms. Bogg stated that a labor market survey showed that the recommended course of study would accommodate a broad range of jobs in the Waterville-Skowhegan area with estimated starting annual earnings of $22,000.00. *Id.* at 4. Ms. Bogg further provided the following rationale for the change:

> The Injured Worker was an Assistant Manager at Burger King at the PX on base of the AAFES in Leimen, Germany, earning $12.98 per hour at the time of her injury resulting in a contusion of her lower back and right leg of 9/01/02. Ms. D'Hulst has a high school degree with no formal additional training and a very limited work history of 12 months work in 1990 and 1992 total as a store clerk/cashier and then at the AAFES base as a sales clerk for 6 weeks and then at Burger King for 2 years. The prevocational training plan for both the Spring and Summer Sessions 2004 provided the basis for developing clerical/office skills. I

> believe that formal testing is not necessary and request that it be waived at this time because this Injured Worker has proven her fortitude and success in the face of difficult personal circumstances. During the Spring Semester, 2004, she had no reliable transportation, a pending divorce, benefits decreased by half, and eviction from housing -- most of which have been resolved. Deborah D'Hulst has worked diligently in the Pre-Vocational Training at KVCC and an Adult Education Class for both pre-requisites and credit classes to complete all but one class. These courses have served as in vivo trial period of successful completion in a school environment. In addition, the use of a computer already purchased through the Longshore Program has been and remains a valuable resource for Ms. D'Hulst's continued success. Any office skill positions (sedentary to light) are within the physical demands noted for this injured worker per the last report of the IME physician, Philip Kimball, M.D., of 11/10/03.

Id. at 4-5. The Claimant signed the revised rehabilitation plan on June 1, 2004. *Id.* at 6. The plan will provide the Claimant a monthly "maintenance" stipend of $100.00 but is otherwise silent as to whether the Claimant can pursue employment while taking classes. *Id.* The Claimant's class schedule commencing August 30, 2004 has two courses running from 8:00 a.m. to 9:20 a.m. and from 11:00 a.m. to 12:20 p.m. on Mondays and Wednesdays, and three courses on Tuesdays and Thursdays at the following times: 8:00 a.m. to 9:20 a.m., 9:30 a.m. to 10:50 a.m., and 1:30 p.m. to 2:20 p.m. *Id.* at 10.

As an initial matter, the burden is on the Claimant to prove that she is unable to perform suitable alternate employment due to her participation in a vocational training program, and denial of total disability compensation is appropriate if she fails to meet this burden. *Kee v. Newport News Shipbuilding & Dry Dock Co*., 33 BRBS 221, 223-224 (2000). The record shows that the two remedial courses which the Claimant took between January 2004 and June 2004 met two nights per week, and the Claimant testified at the hearing that she could have worked up to 30 hours per week. While there is evidence in the record that the Claimant had transportation, family and housing problems, I find that these problems are insufficient to establish that the Claimant could not have worked at least 20 hours per week based on the four hours per day approved by Dr. G.T. Caldwell and the functional capacity evaluation, especially in light of her admission that she could work up to 30 hours per week. Consequently, I conclude that the Claimant has not met her burden of proving that she was unable to perform any of the suitable part-time jobs identified by the February 23, 2004 through August 29, 2004 (the date before commencement of classes for the A.S. degree program). However, commencing August 30, 2004, the Claimant will be attending classes four days per week, and there is no evidence in the record that any of the part-time employers identified by Dr. Wells would be able to accommodate her class schedule. Accordingly, it is necessary to address AAFES' arguments regarding the vocational rehabilitation plan.

The relevant factors to consider in determining whether a claimant is entitled to receive continuing total disability compensation payments while participating in a rehabilitation program are:

(1) whether the employer agreed to the rehabilitation plan and the continuing payment of benefits;

(2) whether the claimant's enrollment in the plan precluded employment;

(3) whether the completion of the program would result in an increased wage-earning capacity for the claimant, thereby maximizing the claimant's skills and minimizing the employer's liability; and

(4) whether the claimant showed full diligence in completing the program.

Newport News at 293; *Castro* at 70. A decision on a claimant's entitlement to continuing total disability compensation should not be based on any single factor, but rather "the guiding legal principles require consideration of a wide range of the relevant factors in reaching the proper result in each case." *Newport News* at 295. As the Court observed in *Newport News*, those guiding legal principle "mandate that vocational rehabilitation be an important tool in returning disabled employees to gainful employment, and in ensuring that such employees possess a measure of long-term economic security." *Id.*

AAFES did not agree to the Claimant's vocational rehabilitation program, and it has not agreed to continue total disability compensation payments while she participates in vocational rehabilitation. Instead, AAFES portrays the Claimant's retraining program as a sham constructed by her attorney in order to provide the Claimant with a sanctuary from the obligation to diligently pursue suitable alternative employment. AAFES also argues that the opinions expressed by Ms. Bogg should be given no credence in view of her bias as evidenced by her admission that she accepted payment from the Claimant's attorney to prepare a critique of Dr. Wells's labor market surveys.[7] Finally, it submits that the Claimant has not shown that the rehabilitation program will substantially increase her wage-earning capacity, and it asserts that the wages the Claimant can expect to earn upon completion of the program will be less than the $12.22 per hour that the Claimant was earning at the time of her injury and no higher than the average salary of all the positions that Dr. Wells identified in his second labor market survey. Employer's Brief at 32-37.

AAFES' claim of bias is not a matter to be taken lightly. Although AAFES has not pointed to anything in the LHWCA or its implementing regulations that expressly prohibits a vocational rehabilitation adviser, who has been appointed by the OWCP to provide services to an injured worker, from simultaneously performing work for one of the parties in the same case,[8] I find that Ms. Bogg's acceptance of fee from the Claimant's attorney to prepare a critique of Dr. Wells' labor market surveys does raise a legitimate question regarding her impartiality, and I have taken this into consideration in determining the weight to be given to her opinions.

[7] Ms. Bogg testified on cross-examination that the Claimant's attorney had paid her to do a critique of Dr. Wells' labor market survey and that she had received no such request from the Department of labor. TR 114

[8] The regulations governing the duties and responsibilities of vocational rehabilitation advisors are found at 20 C.F.R. §§ 702.503 – 702.505.

However, I also find that the questions regarding Ms. Bogg's impartiality do not provide any basis for challenging the Claimant's entitlement to receive vocational rehabilitation services from the OWCP as that is a matter specifically reserved to the discretion of the OWCP's district directors, and an ALJ "has no jurisdiction to address the propriety of vocational rehabilitation." *Castro* at 73. What I do have jurisdiction to address is whether, after consideration of the relevant factors set forth in *Newport News* and *Castro*, the Claimant has established entitlement to total disability compensation payments while participating in vocational rehabilitations. I will now turn that to question.

First, while AAFES did not consent to the Claimant's vocational rehabilitation, there is no evidence, aside from the arguments advanced in this case, that it ever actively opposed retraining. Additionally, an employer's opposition to vocational rehabilitation is not determinative of a claimant's right to receive continuing total disability compensation. *See Castro* at 71-72. Second, there is no evidence that the Claimant is expressly prohibited from taking a job while engaged in her rehabilitation program, but she is required to carry a full-time course load, and I have already determined that there is no evidence that any employer would accommodate her class schedule. Therefore, I find on this record that the Claimant's enrollment in the full-time vocational rehabilitation program commencing August 30, 2004 effectively precludes employment. Third, as to whether the retraining program will increase the Claimant's wage-earning capacity, AAFES is correct that it does not appear likely that the Claimant could expect to earn more than her pre-injury wages, even after completing the A.S. degree program offered by the community college. However, I find that it is appropriate, in assessing the potential benefit of rehabilitative services, to consider the Claimant's current minimal wage-earning capacity for part-time employment rather than simply comparing the wage she was paid prior to the injury with the wage that she could expect to earn upon completion of vocational training. Moreover, evidence of an increased wage-earning capacity is not mandatory for an award of total disability compensation. *Newport News* at 295-296; *Castro* at 72. Fourth, there is an indication that the Claimant experienced difficulty in completing the remedial courses, apparently because of transportation and other economic issues, but there is no evidence that she has been less than fully diligent in pursuing the rehabilitation program.

After weighing the relevant factors, and noting particularly that the Claimant's participation in full-time vocational retraining completion of the vocational retraining since August 30, 2004 effectively precludes her from engaging in alternate employment and that it is reasonable to expect that the Claimant's completion of the rehabilitation program will increase her wage-earning capacity her current minimal capacity for part-time sedentary jobs, I find that the Claimant has established entitlement to total disability compensation commencing August 30, 2004.

E. Compensation Due, Interest, Credits and Attorney's Fees

Based on my finding that the Claimant's temporary total disability continued until February 24, 2004 when AAFES first established the availability of suitable alternative employment, I will award her temporary total disability compensation pursuant to section 8(b) of the LHWCA at the weekly rate of $325.84 (two-thirds of the stipulated average weekly wage) from August 16, 2003 through February 24, 2004. 33 U.S.C. § 908(b). Commencing February

25, 2004, the Claimant is entitled to temporary partial disability which, pursuant to section 8(e) of the LHWCA, is calculated at two-thirds of the difference between an injured employee's average weekly wage before the injury and the wage-earning capacity after the injury. 33 U.S.C. § 908(e). The Claimant's post-injury wage-earning capacity is established by the February 24, 2004 labor market survey, and I will use the average wage of $8.50 per hour paid by the suitable part-time jobs to arrive at an earning capacity of $170.00 per week based on the four hour workdays approved by Dr. G.T. Caldwell and the functional capacity evaluation. Therefore, the Claimant's compensation rate for the period of temporary partial disability (February 25, 2004 through August 29, 2004) shall be $212.51 per week (two-thirds of the difference between the stipulated pre-injury average weekly wage and her current wage-earning capacity). Commencing August 30, 2004, the Claimant shall be restored to temporary total disability compensation at the rate of $325.84 per week.

The Claimant is entitled to interest on any unpaid compensation. *See Foundation Constructors v. Dir.*, OWCP, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F.2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (1982) as of the filing date of this Decision and Order with the District Director.

Since the parties have stipulated that AAFES made voluntary temporary partial disability compensation payments for periods of time covered by the awards made herein, I further find that AAFES is entitled to a credit in the amount of its voluntary payments. 33 U.S.C. § 914(j).

Finally, I find that the Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA based on her attorney's successful prosecution of her claim. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and AAFES will be granted 15 days from the filing of the fee petition to file any objection.

IV. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

(1) The Employer, Army & Air Force Exchange Service, shall pay to the Claimant, Deborah D'Hulst, temporary total disability compensation pursuant to 33 U.S.C. § 908(b) in the amount of $325.84 per week from August 16, 2003 through February 24, 2004 and from August 30, 2004 to the present and continuing until further order;

(2) The Employer, Army & Air Force Exchange Service, shall pay to the Claimant, Deborah D'Hulst, temporary partial disability compensation pursuant to 33 U.S.C. § 908(e) in the amount of $212.51 per week from February 25, 2004 through August 29, 2004;

(3) The Employer, Army & Air Force Exchange Service shall pay interest on any past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982) computed from the date each payment was originally due until paid;

(4) The Employer, Army & Air Force Exchange Service shall be allowed a credit pursuant to 33 U.S.C. § 914(j) in the amount of its voluntary temporary partial disability compensation payments to the Claimant;

(5) The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and AAFES shall have 15 days from the date of service of the application to file any objection; and

(6) All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts